Taking power tools to the *acquis* - The Court of Justice, the Charter of Fundamental Rights and European Union Copyright Law

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Jonathan Griffiths[*]

As is well known, copyright law is only partially harmonized in the European Union.[1] While several important Directives have been adopted, a number of key issues continue to fall within the scope of national law. Nevertheless, over the last few years, the Court of Justice has interpreted the legislative *acquis* in a manner that has done a great deal to develop a more fully articulated body of copyright rules. It has assumed responsibility for several issues that might reasonably have been considered to fall within Member State competence[2] and, as a result, a number of apparent gaps in the coverage of the relevant secondary legislation have been filled. In fleshing out the skeletal framework in this way, the Court has increasingly been guided by the apparent requirements of the rights enshrined in the Union's Charter of Fundamental

[*] Professor of Intellectual Property Law, School of Law, Queen Mary University of London. Earlier versions of this chapter were presented at the Centre for Intellectual Property and Information Law, University of Cambridge (February, 2016) and at the Annual Conference of the Society of Legal Scholars, University of Oxford (September, 2016).

[1] For ease of argument, the term 'European Union' is used throughout here to describe both the European Union and predecessor bodies.

[2] See, for example, the consideration of the originality/creativity standard in Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] EU:C:2009:465 and the regulation of copyright ownership in Case C-277/10 *Luksan v Van der Let* [2011] EU:C:2012:65.

Rights.[3] This development has been described as 'constitutionalization'.[4] In this chapter, I sketch the process of constitutionalization and consider whether it is likely to lead to the further development of rules at European Union level without need for further legislative intervention. In particular, I investigate, first, whether it might result in the establishment of a more comprehensive and more fully harmonized set of exceptions in Union copyright law.[5] Secondly, I ask whether it might also lead to the recognition of a broader range of rights (both economic and non-economic) for authors and other right-holders.[6]

1. The Constitutionalization of European Copyright Law

For many years, the fundamental rights protected under the ECHR and in national legal systems have been recognized as 'general principles' of Union law against the background of which copyright law must be interpreted. Thus, for example, in 1998,

[3] Charter of Fundamental Rights of the European Union, OJ C 364/1, 18 December 2000. For detailed discussion of the Charter, see S Peers et al, *The EU Charter of Fundamental Rights: a Commentary* (Hart Publishing, 2014)

[4] See, for example, C Geiger, 'Constitutionalising' intellectual property law? The influence of fundamental rights on intellectual property in the European Union' (2006) IIC 371; J Griffiths, 'Constitutionalising or harmonising? The Court of Justice, the right of property and European copyright law' (2013) European Law Review 65; T Mylly, 'The constitutionalisation of the European legal order: impact of human rights on intellectual property in the EU' in C Geiger (ed), *Research Handbook on Human Rights* (Edward Elgar, 2015) 103; J Schovsbo, 'Constitutional foundations and constitutionalization of IPR law' (2015) Zeitschrift für Geistiges Eigentum 383.

[5] The term 'exceptions' is used throughout this chapter, even though 'exceptions and limitations' is used generally in the legislative *acquis*.

[6] The arguments advanced in this chapter may, in some instances, apply both to the authors of 'works' and to the holders of rights in other forms of protected subject-matter (often described as 'related rights'). For simplicity's sake, the text refers to authors only.

in (C-200/96) *Metronome Musik GmbH v Music Point Hokamp GmbH,*[7] the Court considered a reference from the Köln Regional Court relating to the validity of Art 1(1) of the Rental and Lending Right Directive,[8] which requires Member States to provide rights to control the rental and lending to the public of works and other subject-matter. In the domestic proceedings, the defendant, who had been prevented from renting out compact discs bearing recorded music, challenged the validity of Art 1 and its domestic implementation on the ground that they breached the defendant's fundamental right to trade freely as a rental business. The Court noted that "according to settled case-law, the freedom to pursue a trade or profession, and likewise the right to property, form part of the general principles of [Union] law"[9] but went on to hold that:

> '[T]he general principle of freedom to pursue a trade or profession cannot be interpreted in isolation from the general principles relating to protection of intellectual property rights and international obligations entered into in that sphere by the Community and by the Member States. Since it does not appear that the objectives pursued could have been achieved by measures which preserved to a greater extent the entrepreneurial freedom of individuals or undertakings specialising in the commercial rental of phonograms, the consequences of introducing an exclusive rental right cannot be regarded as disproportionate and intolerable."[10]

[7] 28 April 1998, ECR [1998] I-1953.
[8] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights relating to copyright in the field of intellectual property (codified version) OJ No L 376/28, 27 December 2006.
[9] Case C-200/96 *Metronome Musik* [1998] EU:C:1998:172. Para 21.
[10] Ibid. [26].

This passage indicates a form of scrutiny within which the rights of copyright owners ('protection of intellectual property rights') are balanced against those of users of copyright works ('freedom to pursue a trade or profession') in a loose assessment of proportionality.

This substratum of fundamental rights was considered again in copyright proceedings in (C-479/04) *Laserdisken ApS v Kulturministeriet*,[11] a reference for a preliminary ruling concerning the interpretation and validity of Art 4(2) of the Information Society Directive, which requires Member States to implement a system of regional (as opposed to international) exhaustion of distribution rights.[12] Laserdisken, a commercial company selling copies of cinematographic works which had previously relied upon a system of international exhaustion of rights to obtain its goods, considered that the change in Danish law arising from the implementation of the Directive had adversely affected its commercial interests. It challenged the validity of this provision of the Directive before the national courts on a number of grounds and a series of questions were referred to the Court of Justice. Amongst these, the Court raised the potential incompatibility of the rule of regional exhaustion enshrined in Art 4(2) with the right of freedom of expression. In relation to freedom of expression, the Court stated that:

[11] 12 September 2006, ECR [2006] I-8098.

[12] Under a system of international exhaustion, the distribution right relating to a particular copy of a copyright work is exhausted on the first transfer of ownership of the copy with the consent of the copyright owner anywhere in the world. Under the system of regional exhaustion applicable within the European Economic Area under the Information Society Directive, the distribution right relating to a particular copy of a copyright work is only exhausted on the first transfer of ownership of the copy with the consent of the right-holder within the European Economic Area. Transfers outside that area do not exhaust the distribution right.

> …[A]ccording to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures, and…, for that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect…Freedom of expression, enshrined in Article 10 of the ECHR, is a fundamental right the observance of which is ensured by the Community courts…The same is true of the right to property, which is guaranteed by Article 1 of the Additional Protocol to the ECHR…[13]

In this particular instance, the Court concluded that a mandatory rule of regional exhaustion did not breach the right of freedom of expression protected under Art 10, ECHR because it was "justified in the light of the need to protect intellectual property rights, including copyright, which form part of the right to property." The outcome in *Laserdisken* was similar to that in *Metronome Musik*, in that the challenge to the constitutionality of Union secondary legislation was dismissed in a cursory manner.[14] Nevertheless, the Court's explicit reference to the analytical framework established under the ECHR hints at a potentially more disciplined framework for the application of fundamental rights than that employed in *Metronome Musik*.[15]

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[13] Case C-479/04 *Laserdisken* [2006EU:C:2006:549, paras 61-62.

[14] In analysing the impact of fundamental rights in the Court's intellectual property jurisprudence, Mylly has characterised the period during which *Metronome Musik* and *Laserdisken* were decided as one of 'rejection and ignorance' of constitutional arguments. See T Mylly 'The constitutionalisation of the European legal order: impact of human rights on intellectual property in the EU', in C Geiger (ed), *Research Handbook on Human Rights* (Edward Elgar, 2015) 103, 107.

[15] The rule of regional exhaustion enshrined in Art 4(2) was also challenged under the principle of equal treatment. However, the Court held that Laserdisken were seeking

The judgment in (C-275/06) *Promusicae,*[16] handed down only a year or so after *Laserdisken* and a year and a half before the coming into force of the Lisbon Treaty, accorded a decidedly more significant role to the fundamental rights enshrined in Union law. As such, the Judgment was something of a breakthrough. In the domestic proceedings, an organization representing producers and publishers of musical and audiovisual recordings sought an order requiring an internet service provider to disclose the identities of a number of the service provider's customers suspected of committing copyright infringement. The national court asked whether the Union's legal framework required Member States to impose a legal obligation upon service providers to communicate customers' personal data in such circumstances in order to ensure the effective protection of copyright via civil proceedings. The reference involved the potential application of several Directives concerning remedies for intellectual property infringement and data privacy.[17] In the view of the Court, a national decision-making body considering such a situation was required to reconcile competing fundamental rights protected within the European legal order - namely the right to respect for private life on the one hand and the rights to protection of property and to an effective remedy on the other. These rights are both recognized as 'general principles' of Union law and are explicitly protected under the Charter of

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to compare situations which were manifestly distinct ((Case C-479/04) *Laserdisken* [67]-[70]).

[16] Case C-275/06 *Promusicae v Telefónica de España* [2008] EU:C:2008:54.

[17] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market; Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

Fundamental Rights. According to the Court, the legislation does not *oblige* Member States to recognize a legal obligation upon ISPs to communicate personal data of suspected infringers. However, Union law requires that, when transposing the relevant Directives:

> …the Member States take care to rely on an interpretation of them which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality.[18]

Thus, in the absence of clear legislative rules, the fundamental rights established under the Charter serve to guide the development of national rules within the framework of Union law.

In 2009, not long after the Court's Judgment in *Promusicae*, the Lisbon Treaty came into force. Under this Treaty, the Charter has equivalent status to the founding EU Treaties[19] and the Court has an explicit obligation to ensure that all activities of Union institutions and Member States implementing Union law[20] are compatible with the

[18] Case C-275/06) *Promusicae v Telefónica de España* [2008] EU:C:2008:54, para 70.

[19] Article 6(1), Treaty of the European Union,

[20] While Article 51(1) of the Charter states that the provisions of the Charter are addressed to Member States only when they are 'implementing Union law', this restriction has been held not to depart from the position adopted by the CJEU before the coming into force of the Lisbon Treaty (ie, that Member States are obliged to

rights protected under the Charter.[21] Unsurprisingly, given the enhanced role accorded to the Charter, the Court has begun to make much more frequent reference to the requirements of the Charter since 2009. This development has given it the tools and the confidence to hold that certain provisions of Union legislation are void because they contravene Charter rights.[22] While the consequences in copyright law have not yet been particularly dramatic, the Court's analysis of the relevant secondary legislation has come increasingly to be conducted within a framework provided by the Charter. The idea of the 'fair balance' between competing rights traced in *Promusicae* has become progressively more prominent in this respect.

In identifying this 'fair balance', a number of fundamental rights have been identified as relevant. The most obvious of these is the right of property which, in addition to being protected under Article 1, Protocol 1 of the ECHR (as in *Laserdisken*)[23] and as a general principle of Union law (as in *Metronome Musik*), is enshrined in Article 17

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ensure compliance with EU fundamental rights both when implementing EU obligations and when acting within a derogation from such obligations). See Case C-617/10) *Åklagaren v Hans Åkerberg Fransson* [2013] EU:C:2013:105, 2 CMLR 46 (CJEU, Gd Chamber); Case C-390/12 *Proceedings brought by Pfleger* [2014] EU:C:2014:281, 3 CMLR 47; cf Case C-106/13 *Fierro & Marmorale v Ronchi*, [2013] EU:C:2013:357; Case C-14/13, *Cholakova*, [2013] EU:C:2013:374.

[21] Article 52(3) of the Charter provides that "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This shall not prevent Union law providing more extensive protection". Article 52(4) provides that "In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions."

[22] See, for example, Case C-236/09, *Association belge des Consommateurs Test-Achats ASBL* [2011] EU:C:2011:100; Case C-92/09 & 93/09, *Volker und Markus Schecke GbR,* [2010] EU:C:2010:662; Case C-293/12, *Digital Rights Ireland Ltd v Minister for Communications, Marine & Natural Resources,* [2014] EU:C:2014:238; Case C-362/14, *Schrems v Data Protection Commissioner*, [2015] EU:C:2015:650.

[23] The European Court of Human Rights has also acknowledged that rightholders in copyright works are protected by Article 1, Prot 1. See *Ashby-Donald v France* (36769/08) 10 January 2013; *Neij v Sweden* (40397/12) [2013] ECDR 7.

of the Charter.[24] The application of the fundamental right of property to intellectual property rights, such as copyright, is confirmed by Art 17(2) of the Charter, which provides that:

> "Intellectual property shall be protected."[25]

The Court has explained that this Delphic statement serves simply to dispel any doubt whether intellectual property rights are covered by Art 17(1)'s general property guarantee, rather than to instigate some form of special super-protected status for intellectual property.[26] Post-Lisbon, in a series of cases in which the Court has interpreted provisions of the Directives in the area of copyright law, Art 17 has provided an important weight on rightholders' side of the 'fair balance'. An example is provided by (C-145/10) *Eva-Maria Painer v StandardVerlags GmbH,* concerning

[24] For discussion of the right of property as it applies to intellectual property in the European legal order, see P Oliver & C Stothers, 'Intellectual property under the Charter: Are the Court's scales properly calibrated?' (2017) Common Market Law Review (forthcoming).
For critique of the Court's application of the right to property in its copyright jurisprudence, see J Griffiths, 'Constitutionalising or harmonising? The Court of Justice, the right of property and European copyright law' (2013) European Law Review 65; T Mylly, 'The constitutionalisation of the European legal order: impact of human rights on intellectual property in the EU' in C Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015) 103; A Peukert, 'The fundamental right to (intellectual) property and the discretion of the legislature' in C Geiger (ed), *Research Handbook,* ibid, 132; M Husovec, 'Intellectual property rights and integration by conflict: the past, present and future' (2016) Cambridge Yearbook of European Legal Studies, 239.

[25] There were initial fears that Art 17(2) indicated that intellectual property was to be accorded relatively unqualified protection under the Charter. See, C Geiger, 'Intellectual property shall be protected!? Article 17(2) of the Charter of Fundamental Rights of the European Union: a mysterious provision with an unclear scope' (2009) EIPR 113; A Peukert, 'Intellectual property as an end in itself?' (2011) EIPR 67.

[26] See, for example, Case C-70/10, *Scarlet Extended v SABAM* [2011] EU:C:2011:771 para 43; Case C-314/12, *UPC Telekabel v Constantin Film Verleih GmbH* [2014] EU:C:2014:192 para 61. For further discussion of art 17(2), see P Torremans, 'Article 17(2) in S Peers et al, *The EU Charter of Fundamental Rights: a Commentary* (Hart Publishing, 2014).

Art 5(3)(d) of the Information Society Directive, which permits Member States to maintain or to implement exceptions for the purpose of quotation. In *Painer*, the Court held that Art 5(3)(d) was intended to strike a fair balance between copyright users' rights of freedom of expression and 'the reproduction right conferred on authors'.[27] While the reproduction right is not explicitly described here as having fundamental status, the reference to the need to establish a 'fair balance' and the acknowledgement of equivalence between the reproduction right and the right of freedom of expression indicate that the Court views the interpretation of Art 5(3)(d) as a task to be carried out within a framework provided by the rights protected under the Charter and that the claimant's right to control the reproduction of a copyright work is one such right.

Since *Painer*, copyright's status as 'property' has been explicitly noted in several cases concerning the scope of the rights granted under the legislative *acquis,*[28] the exceptions to those rights[29] and the remedies available to right-holders against intermediaries.[30] In all such cases, Art 17 provides an interpretative steer in favour of the right-holder. The Charter's right of property has also played a potentially even more significant role in one post-Lisbon Judgment. In (C-277/10) *Luksan v Van der*

[27] Case C-145/10, *Eva-Maria Painer v StandardVerlags GmbH* [2011] EU:C:2013:138, para 134.
[28] See, for example, Case C-160/15 *GS Media BV v Sanoma Media Netherlands BV* [2016] EU:C:2016:644 para 31.
[29] See, for example, Case C-201/13 *Deckmyn v Vandersteen* [2014] EU:C:2014:2132 para 27.
[30] See Case C-70/10 *Scarlet Extended v SABAM* [2011] EU:C:2011:771; Case C-360/10, *SABAM v Netlog NV* [2012] EU:C:2012:85 ; Case C-461/10, *Bonnier Audio AB v Perfect Communication Sweden AB* [2012] EU:C:2012:219 ; Case C-314/12 *UPC Telekabel v Constantin Film Verleih GmbH* [2014] EU:C:2014:192; Case C-484/14 *McFadden v Sony Music Entertainment Germany GmbH*, [2016] EU:C:2016:689.

Let,[31] the Court held that a provision of Austrian law, which vested exploitation rights in a cinematographic work in the producer rather than the director of that work violated the fundamental guarantee of property in the EU's legal order. The Court held that the Information Society Directive implicitly required the principal director of a cinematographic work to be treated as an author of such a work and, accordingly, to benefit from exploitation rights. As a result, any national provision which did not vest exploitation rights in the director "by operation of law, directly and originally" was inevitably in breach of the Directive.[32] This aspect of the Court's judgment is based purely on an interpretation of the legislative *acquis*. However, having come to this conclusion, the Court went on to hold that failure to allocate the exploitation rights at issue to the principal director would not only breach the Directive but would also violate his or her fundamental right to property. The national rule at issue was not "consistent with the requirements flowing from Article 17(2) of the Charter of Fundamental Rights guaranteeing the protection of intellectual property".[33]

This finding is interesting because it effectively accords entrenched status to the Union's legislative rules on copyright, at least in so far as they concern the existence and vesting of rights. If a Member State departs from the attribution of rights established under the *acquis*, it will not only have acted incompatibly with secondary legislation, it will also necessarily have violated the Charter. In *Luksan*, the reference

[31] Case C-277/10 *Luksan v Van der Let* [2012] EU:C:2012:65. This section of the chapter draws upon the description of the Court's Judgment in J Griffiths, 'Constitutionalising or harmonising? The Court of Justice, the right of property and European copyright law' (2013) European Law Review 65.
[32] In the words of the Court: "Since the status of author has been accorded to the principal director of a cinematographic work, it would prove incompatible with the aim pursued by [the Information Society Directive] to accept that [the creator should] be denied the exploitation rights at issue."
[33] Ibid., [70]-[71].

to Art 17 seems something of an afterthought. However, this principle is likely to enhance the arsenal of weapons available to right-holders in copyright litigation.[34] Furthermore, it has been argued that the effect of the Judgment may extend beyond the provisions of the *acquis* in which rights are allocated to authors and others. It has, for example, been suggested that an author's right to property may necessarily be violated whenever the scope of an exception in national law is more expansively interpreted at national level than is permitted under EU law.[35]

However, as will have been apparent from the discussion of the concept of 'fair balance' above, the right of property is not the only fundamental right that will guide the Court of Justice in its interpretation of the copyright Directives. On the user's side of the balance, a substantial weight is provided by the right of freedom of expression and information under Art 11 of the Charter.[36] In *Laserdisken,* it will be recalled, the claimant challenged the validity of the Information Society Directive's mandatory rule of regional exhaustion on the ground of alleged incompatibility with the right of freedom of expression[37] and, in *Painer*, the Court confirmed that the quotation exception in EU law was underpinned by that right.[38] Subsequently, in a series of cases concerning the availability of remedies against intermediaries, the interests of the intermediaries' customers have been held to be covered by the right protected

[34] The ability of domestic courts to enforce Directives directly is limited. See Case C-351/12 *OSA*, [2014] EU:C:2014:110paras 42-48.
[35] For criticism of this potential consequence of the principle established in *Luksan*, see T Mylly, 'The constitutionalisation of the European legal order: impact of human rights on intellectual property in the EU' in C Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015) 103, 120-125.
[36] The use of a copyright work is also covered by the right of freedom of expression under the ECHR. See *Ashby-Donald v France* (36769/08) 10 January 2013; *Neij v Sweden* (40397/12) [2013] ECDR 7.
[37] Case C-479/04, *Laserdisken ApS v Kulturministeriet* [2006] EU:C:2006:549.
[38] Case C-145/10, *Eva-Maria Painer v StandardVerlags GmbH* [2011] EU:C:2011:798para 135.

under Art 11 of the Charter.[39] The relevance of this right has also been confirmed by the Court in cases concerning the scope of the rights granted under the Directives adopted in the area of copyright law[40] and the application of the limitations and exceptions to those rights.[41]

In addition to the generally opposed rights of property and freedom of expression and information, the Court has acknowledged that other Charter rights might also be relevant to the interpretation of the secondary legislation on copyright law. Prominent amongst these have been Art 16, which codifies the right relied upon by the complainant in *Metronome Musik.* Thus, for example, a broadcasting organisation's freedom to conduct a business has been held to militate in favour of a generous interpretation of the exception permitting the making of ephemeral copies of copyright works under Art 5(2)(d) of the Information Society Directive[42] and, in the series of cases in which the Court has been required to consider the availability of remedies against intermediaries (such as disclosure, filtering and blocking orders), the intermediary's interest in avoiding the time and expense of implementing anti-infringement measures has been held to fall within the scope of Art 16.[43] Additionally, in the cases concerning intermediaries, customers' rights to respect for

[39] See, for example, Case C-70/10, *Scarlet Extended v SABAM* [2011] ECR I-11959 [50]-[53]; Case C-360/10) *SABAM v Netlog NV* [2012] ECR 0000 [48]-[51]; Case C-314/12 *UPC Telekabel v Constantin Film Verleih GmbH* [2014] ECDR 12 [55]-[56]; Case C-484/14 *McFadden v Sony Music Entertainment Germany GmbH*, 15 September 2016 [90]-[101].

[40] See, for example, Case C-160/15, *GS Media BV v Sanoma Media Netherlands BV* [31], [45].

[41] See, for example, Case C-201/13, *Deckmyn v Vandersteen* [2011] EU:C:2011:771,[paras 25 - 27

[42] See Case C-510/10 *DR, TV2 Danmark AS v NCB – Nordisk Copyright Bureau* [2012], EU:C:2012:244. Para 57.

[43] See, for example, See, for example, Case C-70/10 *Scarlet Extended v SABAM* [2011] EU:C:2011:771 paras 46-49; Case C-314/12 *UPC Telekabel v Constantin Film Verleih GmbH* [2014] EU:C:2014:192 paras 47-51.

private and family life, home and communications under Art 7 of the Charter and rights to the protection of personal data under Art 8 have also been held to be relevant to the determination of an appropriate balance between competing rights.[44]

The rights outlined above have now come to play an established role in EU copyright discourse. In addition, the Court has sometimes highlighted the relevance of other rights protected under the Charter. Thus, for example, in (C-463/12) *Copydan Båndkopi*, it was held that provisions of Art 5 of the Information Society Directive must always be applied in a manner that respects the Charter's right of equal treatment under Art 20[45] and, in (C-201/13) *Deckmyn v Vandersteen,* the Court concluded that a national court must take into account the potentially discriminatory nature of a parody in determining whether the 'fair balance' of competing rights favours the rightholder or the parodist in a copyright dispute.[46] In *Deckmyn,* it was noted that the principle of non-discrimination is reflected both in EU secondary legislation[47] and in Art 21 of the Charter.

Overall, it can be seen that the Charter has begun to play an increasingly prominent role in EU copyright jurisprudence, having been relied upon to provide a framework of underlying principle for the interpretation of the *acquis*, particularly in areas only lightly regulated by legislation. As such, the Charter has supported the elaboration

[44] Case C-70/10) *Scarlet Extended v SABAM* [2011] EU:C:2011:771 para 50.
[45] Case C-463/12) *Copydan Båndkopi v Nokia Danmark A/S*, [2015] EU:C:2015:144. Note the impact of the application of this principle paras 30-41.
[46] Case C-201/13) *Deckmyn v Vandersteen*, 3 September [2014] EU:C:2014:2132 para 31.
[47] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

and extension of harmonized copyright rules at EU level.[48] At the same time, the shift towards a Charter-based theorisation of copyright law has thrown some established principles of copyright law into doubt. It is, for example, difficult to see how the strict approach to the interpretation of copyright exceptions endorsed in (C-5/08) *Infopaq International A/S v Danske Dagblades Forening*[49] can apply where a court (either at Union or national level) is obliged to identify a 'fair balance' between competing rights.[50] Indeed, it can be suggested that, if the constitutionalization of copyright law is pursued to its logical conclusion, a number of other interesting consequences may follow.

Some of the potential effects of a Charter-based approach are considered in the following two sections of this chapter. The first outlines the possible impact of this interpretative methodology on the copyright exceptions in Union law and the second investigates the possibility that reliance on the Charter might oblige the Court to recognize additional rights, both economic and non-economic, for authors and others. This order of discussion – exceptions first, then rights – may appear contra-intuitive. The sections are set out in this way because, while the consequences in the area of copyright exceptions can be predicted to materialize with some confidence, those relating to the rights of authors remain rather more speculative.

[48] For further detail of this argument, see J Griffiths, 'Constitutionalising or harmonising? The Court of Justice, the right of property and European copyright law' (2013) European Law Review 65.
[49] See Case C-5/08) *Infopaq International A/S v Danske Dagblades Forening* [52009] EU:C:2009:465, paras 56 - 58.
[50] For support of this position, see also J Schovsbo, 'Constitutional foundations and constitutionalization of IPR law' [2015] Zeitschrift für Geistiges Eigentum 383, 391.

2. Potential consequences of the constitutionalization of copyright law – copyright exceptions

The brief review of the constitutionalization process above demonstrates that the rights protected under the Charter have already had some impact on the interpretation of the exceptions permitted under the *acquis*. However, a rights-focused approach may also have further structural impacts. Some of these are discussed in this section, which is divided into two parts. The first considers whether reliance on the Charter necessarily means that a number of ostensibly optional copyright exceptions are, in fact, mandatory for Member States as a matter of EU law. The second asks whether a commitment to an interpretative methodology guided by fundamental rights will inevitably introduce a degree of flexibility into the apparently closed legislative framework for copyright exceptions in Union law.

a. Mandatory exceptions and limitations

Exceptions are a particular weakness from the perspective of the copyright harmonization programme. A specific, fully-harmonized regime of exceptions applies to software.[51] However, for works more generally, there are only a small number of mandatory exceptions at EU level.[52] In most cases, Member States may choose to

[51] See Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (codified version), Arts 5-6.
[52] See, for example, Directive 96/9/EC of the European Parliament and of the Council of the 11th March 1996 on the legal protection of databases, Art 6(1); Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Art 5(1); Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works (Text with EEA relevance).

adopt exceptions permitted under the *acquis* or not.[53] As a consequence, there is considerable diversity in national practice. Art 5 of the Information Society Directive, sets out a list of optional provisions for Member States. The application of several of these exceptions has now been reviewed by the Court, which has confirmed that, even though the adoption of these provisions is described as optional, they are all to be interpreted autonomously as a matter of EU law.[54] It has also been argued that it is a necessary inference from the Court's case-law on exceptions that, if a Member State chooses to adopt a particular exception under Art 5, it must take the exception in its entirety (and as interpreted by the Court).[55] As a consequence, it is suggested, more tightly restricted national exceptions cannot be carved out within the outer limits provided by the relevant provision of Art 5. This interpretation has clear harmonizing potential because it puts the Court in a position to define both the upper and lower limits of all the permitted exceptions. However, it runs counter to the understanding of the effect of Art 5 that prevailed at the time the Directive was adopted and implemented in Member States.

Nevertheless, despite these steps towards a more uniform set of rules on copyright exceptions in the Union, an obvious obstacle to the establishment of a fully harmonized regime remains. While, the definition of each of the provisions in Art 5

[53] See, for example, Directive 96/9/EC of the European Parliament and of the Council of the 11th March 1996 on the legal protection of databases, Art 2; Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Art 5(2)-(4); Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights relating to copyright in the field of intellectual property (codified version), Art 10.

[54] See, for example, Case C-510/10 *DR, TV2 Danmark AS v NCB – Nordisk Copyright Bureau* [2012] EU:C:2012:244, paras 34 and 36; Case C-201/13 *Deckmyn v Vandersteen* [2014] EU:C:2014:2132, paras 14 and 17.

[55] See, for example, E Rosati, 'Copyright in the EU: in search of (in)flexibilities)' (2014) Journal of Intellectual Property Law & Practice 585.

may be a matter of EU law, Member States appear to retain the prerogative whether to select a particular provision or not. Unless and until all Member States choose the same provisions from the list of options (and they have not done so to date), diversity will prevail. On the face of it, it is difficult to see what the Court can do to overcome this obstacle. However, the process of constitutionalization described above may mitigate its effects to a considerable extent. In (C-201/13) *Deckmyn v Vandersteen*,[56] it was held that:

> …[T]he application, in a particular case, of the exception for parody, within the meaning of Article 5(3)(k) of Directive 2001/29, must strike a fair balance between, on the one hand, the interests and rights of [right-holders] and, on the other, the freedom of expression of the user of a protected work who is relying on the exception for parody, within the meaning of Article 5(3)(k).[57]

Under this approach, in some instances, the 'fair balance' between competing rights will inevitably favour the user. It is not difficult to imagine circumstances in which this could be the case. Consider, for example, a situation in which a non-commercial user transforms a copyright work in a proportionate, non-discriminatory, non-substitutive manner in order to make a humorous political point about the transformed work itself. In such circumstances, there is a high chance (i) that the use of the work would be covered by the definition of 'parody' established in *Deckmyn* and (ii) that the 'fair balance' assessment would favour the parodist. Under the Court's rights-based analysis, in this instance, the parodist's freedom of expression would prevail over the property interests of the right-holder.

[56] Case C-201/13 *Deckmyn v Vandersteen*, [2014] EU:C:2014:2132.
[57] Ibid. para 27.

If this is indeed the case, the use in question must not only be sheltered under a national provision implementing Art 5(3)(k) as an option. It *must* necessarily be permitted. Any Member State considering the application of the *acquis*'s exclusive rights against a parodist in such a case would be acting within the scope of EU law. Accordingly, the Charter, including the right of freedom of expression and information protected under Art 11, would be relevant. Where that fair balance of rights favours the parodist, it ought not to be open to a Member State to argue that it does not have to shelter the parody from a claim of infringement because it has not chosen to implement a national provision under Art 5(3)(k). Effectively, in such circumstances, some form of exception for parody is mandatory.[58] The obligation to ensure freedom of expression under the Charter must prevail over the provisions of secondary law describing the exceptions under Art 5 as optional. This will be the case whatever the formal mechanism employed to provide flexibility for parodies in a particular Member State. Thus, for example, In Germany, some parodies are permitted under the 'free use' doctrine [59] and, in Italy, some parodies are accommodated within a flexible infringement test.[60] In Ireland, there is no obviously applicable exception for parody. Nevertheless, in all of those jurisdictions, just as much as in jurisdictions with parody exceptions that more or less resemble the text of Art 5(3)(k), uses in relation to which the 'fair balance' test favours freedom of expression *must* be permitted.

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[58] This conclusion has been noted elsewhere. See, for example, European Copyright Society, 'Limitations and exceptions as key elements of the legal framework for copyright in the European union – Opinion on the Judgment of the CJEU in Case C-201/13 *Deckmyn*' available at https://europeancopyrightsociety.org/how-the-ecs-works/ecs-opinions/ last accessed 15 September 2017.

[59] See, for example, *Bild-Kunst v Focus* (I ZR 117/00) [2005] ECDR 8 (BGH).

[60] See G Ali, 'A Bay of Pigs Crisis in Southern Europe? Fan-dubbing and Parody in the Italian Peninsula' [2015] EIPR 756.

Parody provides a reasonably clear example of the way in which some of the apparently optional provisions under Art 5 are, in reality, mandatory if the logic of constitutionalization is pursued to its necessary conclusion. However, it is not the only likely example of this process. Art 11, for example, may also cover some incidental uses of copyright works,[61] and some uses of works for the purposes of quotation[62] and/or press purposes.[63] Again, in some cases in which the application of these exceptions is at issue, the 'fair balance' of rights must surely favour the user. Again, it would seem that those uses *must* be permitted as a matter of EU law. Other rights under the Charter could also have a similar effect. It is not difficult, for example, to imagine circumstances in which equivalent arguments might be constructed about the application of exceptions which are designed to secure the right to scientific research, [64] the right not to be discriminated against,[65] the right to conduct a business[66] or the right to freedom of the arts.[67]

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[61] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Art 5(3)(i).
[62] Ibid., 5(3)(d). It has been suggested that the exception for quotation is mandatory under the Berne Convention. See S Ricketson & J Ginsburg, International Copyright & Neighbouring Rights – the Berne Convention and Beyond, 2nd ed (OUP, 2005) 13.38
[63] Ibid., Article 5(3)(c).
[64] Art 13. The District Court of Amsterdam has already relied upon the right of scientific research to extend the range of situations covered by exceptions in national law. See M Caspers, "The role of Anne Frank's diary and academic freedom for text and data mining", Kluwer Copyright Blog, 20 January 2016, http://kluwercopyrightblog.com/2016/01/20/the-role-of-anne-franks-diary-and-academic-freedom-for-text-data-mining/. For discussion, see also M Husovec, "Intellectual property rights and integration by conflict: the past, present and future" [2016] Cambridge Yearbook of European Legal Studies 239, 259-261.
[65] Article 21.
[66] Article 16.
[67] Article 13.

b. Flexibility in the list of exceptions and limitations

The discussion above indicates one probable 'structural' consequence of the recognition that certain uses of copyright works are supported by the fundamental rights of users. Primary Treaty obligations, such as those deriving from the Charter, prevail over both the Union's secondary legislation and national implementing legislation. However, it is unlikely to be the only such consequence. The absence of an open-ended 'fair use' or 'flexible use' defence in Union copyright law has been a matter of considerable controversy.[68] The inclusion of a European equivalent of the 'fair use' clause in US copyright law could conceivably protect EU copyright law against the risk of redundancy and sclerosis in the face of technological and cultural change.[69] Others have countered that such a defence would be undesirably or impermissibly uncertain[70] or that the *acquis* already permits considerable flexibility as it stands and, therefore, that the introduction of a specific fair use-type clause may,

[68] For discussion, see P Torremans, 'The perspective of the introduction of a European fair use clause' in T-E Synodinou, *Codification of European Copyright Law – Challenges & Perspectives* (Wolters Kluwer, 2012) 319; B Hugenholtz, 'Flexible copyright: can EU authors' right accommodate fair use?' in I Stamatoudi (ed), *New Developments in international and EU Copyright Law* (Wolters Kluwer, 2016) 417.

[69] For this argument, see J Griffiths, 'Unsticking the Centre-Piece – the Liberation of European Copyright Law' [2010] JIPITEC 1. See also The Wittem Group, 'European Copyright Code' (2011) EIPR 76, 81.

[70] For discussion of argument that the fair use doctrine may infringe international copyright law, see, for example, R Okediji, 'Toward an International Fair Use Doctrine' (2000) 39 Columbia Journal of Transnational Law 75 (particularly 116-130); H Cohen Jehoram, 'Restrictions on Copyright and Their Abuse' (2005) E.I.P.R 359;Burrell and Coleman, *Copyright Exceptions: The Digital Impact,* 2005; S Ricketson, 'The three-step test, deemed quantities, libraries and closed exceptions' (Centre for Copyright Studies, 2003), pp.147-154; T Newby, 'What's fair here is not fair everywhere: does the American fair use doctrine violate international copyright law?' (1999) Stanford L R 1633.

even if desirable, may not be necessary. [71] However, the process of constitutionalization described above may already have changed the terms of this debate

Consider, for example, a situation in which the 'fair balance' of fundamental rights favours the free use of a copyright work while the use at issue is not obviously covered by an exception in national law. In such circumstances, a national court's first impulse is likely to be to rely on the Charter to interpret national law as permissively as possible. [72] However, in some instances, interpretative freedom may be limited. Consider, for example, a situation in which it is deemed necessary, in the interests of freedom of expression, to permit the publication of an extract from a copyright work even though the work has never been lawfully made available to the public. In such circumstances, there may well be difficulties in interpreting any of the permitted national exceptions *contra legem* as applicable to the use at issue. However, even if the interpretative ingenuity of a national judge is defeated in such a case, a form of use protected under the Charter cannot be prohibited. The judge would be obliged to depart from the statutory scheme, presumably by relying directly on the Charter, in order to allow the use to take place.

Given that this must be the case, Art 5 cannot provide a conclusive inventory of all permitted uses. Through recognition of the precedence of Charter rights, a degree of

[71] See, for example, B Hugenholtz and M Senftleben, 'Fair use in Europe: in search of flexibilities', Institute for Information Law, University of Amsterdam, November 2011, available at <https://www.ivir.nl/publicaties/download/Fair%20Use%20Report%20PUB.pdf> accessed 15 October 2017.

[72] For discussion of an example of liberal interpretation by reference to constitutional standards, see E Adeney & C Antons, 'The *Germania 3* decision translated: the quotation exception before the German Constitutional Court' (2013)EIPR 646.

flexibility has therefore already been introduced into the *acquis*. The Charter will not provide as wide a degree of judicial freedom to permit uses as is available under statutory fair use clauses. Nevertheless, it has considerable potential to 'open' the apparently closed *acquis* on exceptions.[73] Consider, for example, the use of copyright works for the purpose of text-mining. Such use may fall within an existing national exception covered by Art 5(3)(a), which allows the use of work for the purpose of 'scientific research' as long as the conditions set out in that provision are satisfied. However, such exceptions will not cover the use of copyright works for a commercial purpose. Imagine a situation in which a commercial organization develops a programme of text-mining research that, while having huge potential benefit for human health, is hampered by rightholders' intransigence or insistence on excessive licence fees. In such a case, the 'non-consumptive' reproductions made by the research organization lie far from the 'core' of an author's right to benefit from the exploitation of his or her work. Accordingly, the 'fair balance' between the right-holder's property interest in its corpus of text and the right of scientific research and/or human health would seem to favour free use of the protected materials. In such circumstances, the need to ensure compliance with the Charter would appear to justify departure from the apparently exhaustively-defined list of exceptions in Art 5.[74]

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[73] Conversely, it has been argued that constitutionalization could, to some extent, result in a loss of flexibility as a result of a form of 'lock-in' for policy outcomes supported fundamental rights. For discussion, see T Mylly, 'The constitutionalisation of the European legal order: impact of human rights on intellectual property in the EU' in C Geiger (ed), *Research Handbook on Human Rights* (Edward Elgar, 2015) 103, 127 et seq; J Schovsbo, 'Constitutional foundations and constitutionalization of IPR law' (2015) Zeitschrift für Geistiges Eigentum 383, 390.

[74] This possibility has been noted by others. See M Husovec, 'Intellectual property rights and integration by conflict: the past, present and future' (2016) Cambridge Yearbook of European Legal Studies 239, 259-261 ; A Ohly, 'European fundamental rights & intellectual property' in A Ohly and J Pila, *The Europeanization of Intellectual Property Law* (OUP, 2013) 145; A Peukert, 'The fundamental right to (intellectual) property and the discretion of the legislature' in C Geiger (ed), *Research*

3. Potential consequences of the constitutionalization of copyright – the rights of authors and others

It can thus be seen that the process of constitutionalization, which began haltingly by reference to general principles of EU law and which has sometimes been applied to shore up orthodox exercises in legislative interpretation,[75] may also have the capacity to produce fairly dramatic outcomes in copyright law. In the medium term, this process seems likely to contribute to the development of a more fully integrated set of rules on copyright exceptions. In the next section of this chapter, I consider whether the process might also an impact on the grant of rights, both economic and non-economic, in EU law.

The programme of harmonization is more fully realised in the case of the rights of authors and others than it is in the case of exceptions. However, it is not yet complete. A number of gaps and inconsistencies remain.[76] Thus, for example, the right to authorise the live performance of works remains a matter for national law[77] and, while a right of adaptation is granted to certain specific categories of author,[78] EU law does

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Handbook on Human Rights and Intellectual Property (Edward Elgar, 2015) 132, 134-5.

[75] See, for example, Case C-277/10 *Luksan v Van der Let* [2012] EU:C:2012:65.

[76] For discussion, see M van Eechoud et al, *Harmonizing European Copyright Law – the Challenges of Better Lawmakin*g (Wolters Kluwer, 2009).

[77] See Case C-283/10 *Circul Globus Bucuresti v Uniunea Compozitorilor* s*i Muzicologilor din România*, [2011] EU:C:2011:772.

[78] See Directive 96/9/EC of the European Parliament and of the Council of the 11th March 1996 on the legal protection of databases, Art 5(b); Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (codified version), Article 4(1)(b).

not explicitly grant an adaptation right to the authors of works more generally. The moral rights of authors lie entirely outside the harmonization programme. In this section, my purpose is to investigate whether the constitutionalization process has the capacity to 'complete' some of these gaps; that is, to ask whether an author might be entitled to rely on the Charter in arguing that he or she should be permitted to control uses of works beyond the situations specified in the secondary legislation relating to copyright. This analysis focuses on two examples. The first is the potential impact of constitutionalization on the adaptation right in Union law and the second is the more radical claim that the Charter requires the recognition of authors' moral rights at EU level.

a. A claim to an adaptation right relating to all categories of work?

As a matter of national law in all Member States, authors are entitled to control the adaptation of their works. However, as noted above, the Union's legislative *acquis* grants an adaptation right only to authors of certain specific categories of work. It can be argued that the right to control adaptations more generally is implicit within other exclusive rights under the Information Society Directive, most obviously, the reproduction right.[79] However, it is by no means clear that this is the case. Can it be argued that the process of constitutionalization outlined in this chapter inevitably means that authors of all forms of work have a right to control the adaptation of their works as a matter of EU law? Even though such a right exists in the national laws of all Member States, the recognition of this right in Union law would be likely to have

[79] This could be argued to be a necessary implication from reference to the Court in Case C-201/13 *Deckmyn v Vandersteen* [2014] EU:C:2014:2132.

significant impact. For example, if the right falls within the *acquis*, the Court of Justice, rather than national legislatures and/or courts, has authority to determine its scope. This is likely to affect the methodology for determining infringement in the Member States, where a high degree of diversity still prevails in relation to the appropriate approach to the analysis of infringement of copyright in altered form.

The question of whether or not constitutionalization has this effect must be approached in two stages. First, it is necessary to determine whether or not the rights set out in the Charter are capable of forming a foundation for an author's claim to a general right of adaptation. That is, to ask whether the claim to resist adaptation of a copyright work without permission is potentially *covered* by a fundamental rights claim? Secondly, it is also necessary to establish whether or not this issue (ie, the potential recognition of a general adaptation right) is one that lies within the scope of EU, as opposed to domestic, law. It was not necessary to consider this second question in assessing the potential impact of constitutionalization on the copyright exceptions above because any court considering the application of an exception to the rights granted under the copyright Directives would necessarily be implementing EU law. The cause of action at issue would clearly involve the enforcement of rights established under EU secondary legislation. However, in analysing the potential impact of the Charter on a claim to a right that has not explicitly been granted under the *acquis*, the second question is much more pertinent.

At the first stage, the fundamental right with most obvious relevance to this situation is the right of property under Art 17 of the Charter. However, this right has important limitations which may prevent it from serving as a foundation for such a claim. The

right of property in the European legal order (as a general principle of EU law, under Art 1, Prot 1 of the ECHR and under Art 17) is a right against unjustified interference with *existing* legally-recognized property interests.[80] It cannot generally be relied upon in support of a claim to the recognition of forms of property which do not currently exist within a legal system.[81] On the face of it, this limitation presents a serious obstacle to the author's argument that Art 17 requires the recognition of a general adaptation right in European copyright law. If we envisage each of the rights granted to an author under the *acquis* as a distinct property entitlement (reproduction right, rental right, communication to the public right, etc), any such claim would appear to be precluded.

However, this may not be the only way of looking at this issue. If we view the various entitlements granted to creators as aspects of single integrated right to control the use of a work rather than as distinct, self-standing rights, the argument based on Art 17 may be more plausible. Under this approach, the claim to a general Union-level adaptation right for authors can be conceived as a claim to a specific form of right or interest (the right to control adaptation) which supports the author's more general, undifferentiated interest in a creative work. As such, it may be possible to argue that the Union's legislative *acquis* grants authorship status and a set of legislative rights to the creators of works and that the recognition of a particular authorial entitlement (the right to control adaptation of a work, for example) does not involve legal recognition of a distinct, previously unrecognized form of property. This analytical framework may seem to be at odds with the traditional approach to copyrights interests adopted in anglo-saxon jurisdictions, where the rights of authors have traditionally been

[80] See *Marckx v Belgium* (1979) 2 EHRR 330; *Fabris v France* (2013) EHRR 19.
[81] See, for example, *Klein v Austria* (2014) 59 EHRR 14.

viewed as a series of separate legal entitlements rather than as specific instances of a more general 'author's right', but it is more in keeping with the theorisation of authors' rights in most Member States. Importantly, it is also an approach which would also appear to underlie the treatment of the concept of 'property' or 'possessions' in European fundamental rights law.[82]

Nevertheless, there is a further potential obstacle in the way of a claim that Art 17 supports the recognition of an adaptation right for authors in Union copyright law. The right of property under Art 17 and Art 1, Prot 1 is a right against *interference* with property and has rarely been held to impose a positive obligation of protection on a contracting state.[83] This is problematic, as a claim to a 'missing' right, such as the right to control adaptation, requires a court to accept that an author's legitimate entitlement had been interfered with through *non-recognition*. On the face of it, this would appear to be difficult. However, the Court's recent case-law has muddied the distinction between the obligation not to interfere with a property right and the obligation positively to protect property. Indeed, it seems likely that, under the Court's existing copyright jurisprudence, national courts have an obligation to act positively to protect authors against interferences committed by third parties. This is a reasonable inference from (C-275/06) *Promusicae* and subsequent cases concerning the obligation of internet intermediaries towards authors. Effectively, under the 'fair balance' approach laid down in those cases, national authorities must, at least in some circumstances, ensure the availability of some form of redress for third party interference with a work.

[82] See, DJ Harris et al, *Law of the European Convention on Human Rights*, 2nd ed (OUP, 2014) 886.
[83] Ibid., 870-872.

While not explicitly theorized in this way, *Promusicae* appears to rely on the principle that a right-holder is entitled to effective redress for violation of fundamental rights. This position is more clearly apparent in the Court's recent trade mark Judgment in (C-580/13) *Coty Germany GmbH v Stadtparkasse Magdeburg*. In the national proceedings in *Coty*, the trade mark owner sought personal identification data concerning a potential infringer from a bank which had received the proceeds of the potential infringement. The national court was concerned that the making of a disclosure order, although potentially supported by the Enforcement Directive,[84] would conflict with rules on banking secrecy and with the customer's right to data privacy. Explicitly relying on *Promusicae*, the Court held that a Member State was required to reconcile competing rights, both under Union secondary law and under the Charter. In this instance, however, the trade mark owner's right to an effective remedy, as protected under Art 47 of the Charter was clearly recognized:

> The right to information which is intended to benefit the applicant in the context of proceedings concerning an infringement of his right to property thus seeks, in the field concerned, to apply and implement the fundamental right to an effective remedy guaranteed in Article 47 of the Charter, and thereby to ensure the effective exercise of the fundamental right to property, which includes the intellectual property right protected in Article 17(2) of the

[84] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, Art 8(3)(e).

> Charter….[T]he first of those fundamental rights is a necessary instrument for the purpose of protecting the second.[85]

In the Court's view, the 'fair balance' between competing rights in this situation precluded the application of a national rule systematically favouring the interest in banking secrecy by prohibiting the disclosure of personal data in all circumstances.[86]

Husovec has argued that, in relying on Arts 47 and 17(2) in *Coty*, the Court extended the scope of the principle established in *Promusicae* by finding that, in some situations at least, a Member State will be obliged to implement disclosure orders against suspected infringers of intellectual property rights.[87] He also notes more generally that *Coty* confirms a positive obligation upon Member States to protect intellectual property rights and expresses concern about the potential expansionist consequences of this development. He argues that this recognition of positive obligations through the right of property is inconsistent with the structure of property guarantees enshrined in national constitutions and with the Court's own jurisprudence on the secondary legislation applicable to copyright.[88] Nevertheless, the Court's willingness to recognize a positive obligation to protect intellectual property deriving from the Charter in *Coty* offers potential support to the argument that Art 17 might provide the foundation for the recognition of 'missing' rights in the copyright *acquis*.

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[85] Case C-580/13 *Coty Germany GmbH v Stadtparkasse Magdeburg* [2015] EU:C:2015:485 para 29.
[86] Ibid., para 41.
[87] Cf *Promusicae*, in which the Court held that there was no r*equirement* on a state to implement such a measure on the circumstances of that case.
[88] See M Husovec, 'Intellectual property rights and integration by conflict: the past, present and future' [2016] Cambridge Yearbook of European Legal Studies 239. For support for the former criticism, see also C Sganga, 'EU Copyright Law Between Property & Fundamental Rights: a Proposal to Connect the Dots' in Caso and F Giovanella, *Balancing Copyright Law in the Digital Age* (Springer, 2015).

Arguably, such a claim goes beyond *Coty*, which concerned *remedial* protection as opposed to the grant of a right to control a particular form of use of the protected form. However, given the absence of a clearly disciplined framework of principle in the Court's fundamental rights jurisprudence and the expansionist tendency in its copyright case-law, it does not seem impossible that the Court would be willing to take such a step.

At the beginning of this section, it was explained that there is also a second potential question to be answered if a successful claim to an adaptation right based on Art 17 is to be established. Does such a claim lie within the scope of EU law - as required under Art 51 if the Charter is to apply?[89] In fact, it can be suggested that, if the first question is answered in the manner outlined above, the second presents no real obstacle. If the various rights of authors are conceived as separate, free-standing property rights, questions concerning the availability of the adaptation right seem likely to fall within the scope of national law. However, if an author's rights under the *acquis* are viewed as a composite group of entitlements giving rise to a positive obligation of protection (including protection against adaptation), a court recognising a general adaptation right for authors ought to be regarded as implementing EU law. Thus, if the first hurdle is surmounted, the second hurdle must necessarily also be cleared.

The complex argument based on Art 17 could, of course, be by-passed if a court were simply willing to interpret the concept of 'reproduction' generously in favour of authors. Nevertheless, the Court has previously reinforced conclusions on the

[89] For further discussion of Art 51, see A ward, 'Article 51' in S Peers et al, *The EU Charter of Fundamental Rights: a Commentary* (Hart Publishing, 2014) 1413-1454.

interpretation of Union secondary legislation by reference to the Charter[90] and the Art 17 argument outlined here might, at least, offer attractive support to a court considering the potential generalisation of the adaptation right in Union copyright law. The rights established under the Charter might be used, at very least, to bolster a claim to extend the scope of the existing rights granted to authors in Union law in this way. Such a claim is not particularly controversial and is likely to be attractive to the Court. There is a fairly strong argument that the right is already implicit in the *acquis* and adaptation rights for authors are required under international treaty.[91] They are also explicitly recognised in the national law of Member States and, in the case of certain categories of work, in Union law.

b. A claim to the protection of moral rights?

Could arguments based upon the fundamental rights protected under the Charter have even more dramatic effects than those outlined above? Could constitutionalization, for example, require the recognition of rights with a much weaker link to the existing secondary legislation, such as the moral rights granted to authors in national law? All Member States are obliged to provide such rights at a minimum level for creators and performers under international treaty but national laws take widely divergent forms.[92] However, as is well-known, moral rights are not harmonized within the Union. The

[90] See Case C-277/10 *Luksan v Van der Let* [2012] EU:C:2012:65; Case C-510/10 *DR, TV2 Danmark AS v NCB – Nordisk Copyright Bureau* [2012] EU:C:2012:244.
[91] Berne Convention for the Protection of Literary & Artistic Works 1886 (Paris Act), Article 12.
[92] For discussion of moral rights in national laws, see E Adeney, *The Moral Rights of Authors & Performers* (OUP, 2006); G Davies & K Garnett, *Moral Rights*, 2nd ed (Sweet & Maxwell, 2016).

legislative *acquis* contains clear statements that such rights lie entirely outside the scope of the Directives in the field of copyright.[93] Thus, on the face of it, questions relating to the entitlement of creators to the protection of the interests secured by moral rights continue to be governed by national law.[94] On this basis, the argument that the Charter might support the recognition of such rights within Union law looks much less promising than that advanced in relation to the adaptation right above. However, let us apply the same two-stage structure of analysis outlined above to establish whether it is doomed to failure.

At the first stage, then, it is necessary to ask whether a claim to moral rights protection is supported by any of the rights granted under the Charter. There is little direct authority on this question. While the European Court of Human Rights has reviewed the application of the ECHR in copyright cases,[95] it has not yet had an opportunity to consider an application specifically focusing on creators' moral rights. Nevertheless, the Court's jurisprudence suggests that such rights are likely to be regarded as 'possessions' under the Convention.[96] The concept of property, or

[93] See, for example, Recital 19 of the Information Society directive. The fact that protection of moral rights lies outside the *acquis* was noted by Advocate General Cruz Villalón in his Opinion in Case C-201/13 *Deckmyn v Vandersteen* [2013] EU:C:2014:2132 {AG 28].

[94] Similar arguments to those set out here could be made for performers, who are entitled to certain moral rights under international law (WIPO Performances and Phonograms Treaty 1996, Art 5; WIPO Beijing Treaty on Audiovisual Performances 2012, Article 5). However, for simplicity's sake, discussion in the text is restricted to authors.

[95] See, for example, *Ashby Donald v France* 36769/08, 10th January 2103 (ECtHR, 5th section); *Neij v Sweden* [2013] ECDR 7.

[96] This issue has been discussed in J Drexl, 'Constitutional protection of authors' moral rights in the European Union - between privacy, property and the regulation of the economy" in KS Ziegler (ed), *Human Rights and Private Law. Privacy as Autonomy,* Studies of the Oxford Institute of European and Comparative Law 5, (Hart Publishing, 2007) 159. Although, cf P Oliver & C Stothers, 'Intellectual property

'possessions' in fundamental rights law is not restricted to interests described as such in national law. Accordingly, an author's claim to have been deprived of those rights is likely to be 'covered' by a claim under Art 1, Prot 1 (and therefore by a claim under Art 17). However, as noted above, a distinction must be drawn between a right against interference with an existing property right, as protected under the European legal order, and a claim to recognition of a previously unavailable form of property.

In considering the claim relating to the adaptation right, it has already been argued that it may be possible to theorize the collective entitlements of an author as a single broadly formulated form of property and individual rights to control specific activities (such as adaptation or communication to the public) as interests that Member States must recognize in pursuance of a positive obligation to protect the property in the work deriving from Art 17. It may be much harder to apply a similar logic to the non-economic interests of authors. As a matter of practice, the explicit legislative statements that moral rights fall outside the *acquis* seem likely to make it harder to argue convincingly that the non-economic interests secured by those rights must be recognized in order to protect the author's right(s) established in Union law. However, Art 17 may not be the only provision of the Charter upon which a claim to the recognition of moral rights could be founded. Other Charter rights do not share Art 17's key limitation, in that their application is not restricted to situations concerning interferences with interests already recognised in positive law. Could it, for example, be argued that the freedom of the arts, protected under Art 13 of the Charter, inherently requires the recognition of authors' moral rights?

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under the Charter: Are the Court's scales properly calibrated?' (2017) Common Market Law Review (forthcoming).

One difficulty with such a claim is that the scope of protection offered by the freedom of the arts in EU law remains largely uncharted.[97] It has been suggested that the right may simply be a specifically enumerated aspect of the more general right of freedom of expression and information protected under Art 11.[98] If this is so, it may not prove a promising basis for the argument that the Charter requires the moral rights of authors and performers to be recognized in Union law. While a *defendant* in moral rights proceedings in a national court may well be able to rely on the right of freedom of expression, Art 11, ECHR (and thus Art 13 of the Charter) are less likely to apply to an author whose rights are *not* recognized within a legal system. As a matter of principle, the existence of moral rights may be supported by the right to freedom of expression because such rights are designed to protect the integrity of an author's speech.[99] However, the right of freedom of expression as it exists in the European legal order has not, as yet, been held to encompass a right *not* to speak in a particular manner. While this difficulty of principle may not be insuperable because the Court has typically adopted a fairly liberal approach to the Charter in the Court's jurisprudence and it would not be surprising if it were to blur the theoretical distinction between the right to express oneself and the right not to do so. Nevertheless, authors may find it more fruitful to look elsewhere in the Charter for a foundation on which to base a claim to recognition of a moral rights in Union copyright law.

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[97] For discussion, see D Sayers, 'Freedom of the Arts & Sciences' in S Peers et al, *The EU Charter of Fundamental Rights: a Commentary* (Hart Publishing, 2014) 379-400.

[98] Ibid., 389.

[99] For discussion, see K Treiger-Bar-Am, 'The Moral Right of Integrity: a Freedom of Expression' in F Macmillan (ed), *New Directions in Copyright*, vol 2 (Edward Elgar, 2005) 127; RR Kwall, *The Soul of Creativity: Forging a Moral Rights Law for the United States* (Stanford University Press, 2009).

Moral rights protect authors' personal interests in copyright work. On that basis, the Charter rights that support the interests in human dignity (Art 1) or in respect for private life and communications (Art 7) may be worthy of further exploration. Art 7 (equivalent to Art 8, ECHR), may be particularly promising in this respect. While the Strasbourg Court has not yet had the opportunity to consider a specific complaint relating to failure to provide adequate protection for a creator's personality rights in a creative work, its jurisprudence suggests that the interests at issue in such claims may well fall within the scope of Art 8, ECHR. In cases concerning national defamation proceedings, Art 8 has been held to cover reputational interests.[100] The European Court of Human Rights has also held that a person's interest in prohibiting the use of his or her name without consent is covered by Art 8.[101] Such interests are not closely aligned with those protected under national moral rights laws and, on this basis, it seems reasonably likely that an author's personality interests in his or her work would fall within Art 8, ECHR (and thus Art 7 of the Charter). On this basis therefore, at the first stage of analysis, this provision may well provide a potential foundation for a claim to the recognition of such interests in Union law.

How would such an argument fare at the second stage of analysis applied in this chapter? Would it be regarded as falling within the scope of EU law? On the face of it, this second hurdle would appear to present a serious obstacle. Consider, for example, a hypothetical situation in which an author believes that his or her moral

[100] See, for example, *Pfeifer v Austria* (2007) 48 EHRR 175.
[101] See, for example, *Ernst August von Hannover v Germany* 53649/09, 19th February 2015; *Bohlen v Germany* 53495/09, 19th February 2015. On the right to a name, see also *Burghartz v Switzerland* (1994) 18 EHRR 101; Case C-208/09) *Sayn-Wittgenstein v Landeshauptmann von Wien*, [2010] EU:C:2010:806.

rights are inadequately protected by the laws of a particular Member State.[102] Could he or she argue that the Member State is obliged, as a matter of EU law, to furnish a higher level of protection in order to satisfy the requirements of Art 7? At first sight, this looks unlikely. Again, against the background of a series of explicit legislative statements that moral rights are not covered by the relevant Directives, it is difficult to see how a court considering such a challenge could be regarded as 'implementing EU law'. Nevertheless, even though such a direct rights-based claim seems unlikely, it is possible that specific issues relating to the application of moral rights law in Member States might fall within the scope of EU law and, therefore, that the Charter may have a bearing in those proceedings. It is, of course, a long-established principle that the application of national rules derogating from the freedom of movement of goods and services falls under the scrutiny of the Court and, therefore, that the framework of fundamental rights is relevant in any assessment of the justification of such rules.[103] As a consequence, the rights protected under the Charter may at least have some relevance in cases concerning the application of moral rights.

Consider a situation in which the circulation of published copies of a copyright work is impeded through the differential application of moral rights protection in Member States. What if, for example, the exercise of the moral right of retraction in France were to have an impact on the free movement of works published and distributed freely elsewhere in the Union?[104] Alternatively, what if a claim based upon the moral right of integrity were to be relied upon by an author's successors in order to restrict

[102] The moral rights provisions of both the United Kingdom and Ireland have significant weaknesses from an author's perspective.
[103] See Case C-390/12. *Proceedings brought by Pfleger* [2014] EU:C:2014:281, 3 CMLR 47 paras30-37.
[104] For discussion of the moral right of retraction in French law, see G Davies & K Garnett, *Moral Rights*, 2nd ed (Sweet & Maxwell, 2016).

the distribution of copies of a work in which the copyright has long expired and which, as a result, are freely available in other Member States.[105] In such situations, the application of national moral rights law would potentially create an impediment to the free movement of goods. In considering the justifiability of such restriction, a court applying EU law would be obliged to consider not only the application of the Union's market freedoms but also to arrive at a fair balance between competing rights protected under the Charter - on the one hand, the rights of the author (or of his or her representatives) under Arts 7 or 13 and, on the other hand, the right to freedom of expression and/or the right to conduct a business of the undertaking seeking to exploit the work.

The absorption of such issues into Union law would not have the same direct, harmonising potential as the recognition of 'missing' economic rights. A dispute relating to the application of national moral rights law in circumstances such as those outlined above might, at most, result in the trimming back of the national right and thus lead to an incremental form of downward harmonisation of national moral rights laws. It could not produce the type of gap-filling effects potentially observed in the case of the adaptation right. However, even such a modest impact or, indeed, even a finding that a national moral rights claim can be justified by reference to the Charter in a particular case could conceivably send a signal to the Union legislature – indicating both that the enforcement of moral rights at national level is capable of disrupting the internal market and inviting a legislative response. Such a response would, of course, have to be guided by the values established under the Charter.

[105] See *Hugo c. Société Plon,* arrêt no 125 du 30 janvier2007 (Cass. Civ. 1ère).

CONCLUSION

My aim here has been to trace the process of constitutionalization in European Union copyright law to date and to consider some of its previously unnoticed potential consequences. There is clearly scope for more detailed examination of specific aspects of this process.[106] Constitutionalization has been welcomed by some scholars[107] or, at least, has been considered an inevitable consequence of the Union's current constitutional arrangements.[108] Others have been more critical of the Court's application of fundamental rights law in the copyright context.[109] However, whatever

[106] See, for example, C Angelopoulos, 'Tracing the outline of a ghost: the fair balance between copyright and fundamental rights in intermediary liability' (2015-16) *Info – the Journal of Policy, Regulation and Strategy for Telecommunications, Information & Media*, 72.

[107] See, for example, C Geiger, 'Constitutionalising' intellectual property law? The influence of fundamental rights on intellectual property in the European Union' [2006] IIC 371; A Ohly, 'European fundamental rights & intellectual property' in A Ohly and J Pila, *The Europeanization of Intellectual Property Law* (OUP, 2013) 145; C Geiger, 'Fundamental rights as common principles of intellectual property enforcement' in A Ohly (ed) *Common Principles of European Intellectual Property Law* (Mohr Sieback, 2012) 223; C Geiger, 'Reconceptualising the constitutional dimension of intellectual property' in P Torremans (ed), *Intellectual Property & Human Rights*, 3d ed (Kluwer Law International, 2015) 115.

[108] See, for example, C Angelopoulos, 'Tracing the outline of a ghost: the fair balance between copyright and fundamental rights in intermediary liability' (2015-16) *Info – the Journal of Policy, Regulation and Strategy for Telecommunications, Information & Media*, 72

[109] See, for example, J Griffiths, 'Constitutionalising or harmonising? The Court of Justice, the right of property and European copyright law' (2013) European Law Review 65; T Mylly, 'The constitutionalisation of the European legal order: impact of human rights on intellectual property in the EU' in C Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015) 103; A Peukert, 'The fundamental right to (intellectual) property and the discretion of the legislature', in C Geiger (ed), *Research Handbook,* ibid., 132; C Sganga, 'EU Copyright Law Between Property & Fundamental Rights: a Proposal to Connect the Dots' in Caso and F Giovanella, *Balancing Copyright Law in the Digital Age* (Springer, 2015); M Husovec, 'Intellectual property rights and integration by conflict: the past, present and future' (2016) Cambridge Yearbook of European Legal Studies 239.

the perspective taken, it is reasonably clear that a strong commitment to the development of copyright law in accordance with the Charter is likely to have significant effects on Union copyright law in future. Overall, the enhanced status of the Charter shifts the balance of power from legislature to judiciary at both Union and national level. The force of rules deriving from secondary legislation has faded by comparison with the more flexible, but potentially also more powerful, requirements of the Charter.

This shift places copyright law on principled constitutional foundations and brings certain pragmatic benefits. In recent years, the legislative reform of copyright law has become difficult because it takes place in such a hotly contested policy environment. The process of constitutionalization provides courts with powerful tools to develop the law in the absence of precise legislative instruction. Indeed, where necessary, it permits divergence from legislative provisions no longer considered appropriate. Nevertheless, courts applying Union law, and particularly the Court of Justice, must ensure that the potent tools with which they have been furnished are wielded carefully and consistently.[110] The process of constitutionalization must not serve as a smoke-screen for policy-based or pragmatic decision-making and must not result in outcomes that offend the fundamental principle of legality, itself a cornerstone of the European legal order.

[110] See also, P Oliver & C Stothers, 'Intellectual property under the Charter: Are the Court's scales properly calibrated?' (2017) Common Market Law Review (forthcoming).